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NO. 96-1041

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD D. McVICAR, WARDEN, Petitioner

vs.

LEE OTIS GRIFFIN, Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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The Respondent, Lee Otis Griffin, respectfully requests this Court, in accordance with his attached affidavit, for leave to file a Brief in Opposition to the Petition for Writ of Certiorari without payment of costs and to proceed *in forma pauperis* pursuant to Rule 46.

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IN FORMA PAUPERIS AFFIDAVIT

IN THE

UNITED STATES SUPREME COURT

RICHARD D. McVICAR, Petitioner

vs.

LEE OTIS GRIFFIN,
Respondent.

AFFIDAVIT IN SUPPORT
OF REQUEST TO PROCEED
IN FORMA PAUPERIS

I, Lee Otis Griffin, being first duly sworn, depose and say that I am the Respondent in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes (x) No ( )

(a) If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

$450.00 per month (Gross) Four hundred & Fifty Dollars

Idea M. Myers, 308 North Illinois Belleville IL 62220

"Special Note:) MUST SUBTRACT My Room & Board @ 400.00 PER Month BALANCE REMAINING 50.00 PER MONTH CLEAR..

(b) If the answer is "no," state the date of past employment and the amount of the salary and wages per month which you received.

---

2. Have you received within the past twelve months any money from any of the following sources?

(a) Business, profession or form of self-employment?

Yes ( ) No (X)

(b) Rent payment, interest or dividends?

Yes ( ) No (X)

(c) Pensions, annuities or life insurance payments?

Yes ( ) No (X)

(d) Gifts or inheritances?

Yes ( ) No (X)

(e) Any other sources?

Yes ( ) No (X)

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

N/A

3. Do you own cash, or do you have money in checking or savings accounts?

Yes ( ) No (X) (Include any funds in prison accounts)

If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ( ) No (X)

If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

N/A

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Lee O. Griffin

LEE OTIS GRIFFIN, Respondent

STATE OF ILLINOIS)
) SS
COUNTY OF ST. CLAIR)

LEE OTIS GRIFFIN, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct to the best of his knowledge and belief.

Lee O. Griffin

LEE OTIS GRIFFIN
Respondent

Subscribed and sworn to
before me on this 28th
day of January, 1997.

Dorothy Schobert
NOTARY PUBLIC

"OFFICIAL SEAL"
Dorothy Schobert
Notary Public, State of Illinois
My Commission Expires 10/31/98

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR RESPONDENT

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Assistant Defender

OF COUNSEL

LIST OF INTERESTED PARTIES

The respondent (hereafter referred to as "Griffin") is correctly identified in the caption as Lee Otis Griffin.

The petitioner (hereafter referred to as the "State") is correctly identified in the petition except that the respondent has been enlarged on bail and does not presently reside at the prison of which Richard D. McVicar is warden. The respondent's last place of incarceration was Centralia Correctional Center in Centralia, Illinois. The warden of that institution is Ronald Haws.

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NO. 96-1041

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vs.

LEE OTIS GRIFFIN, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Lee Otis Griffin, requests that the Court deny the petition for *writ of certiorari* seeking review of the opinion and judgment of the Seventh Circuit Court of Appeals reported at ***Griffin v. McVicar***, 84 F.3d 880 (7th Cir. 1996) (May 21, 1996), as amended on denial of rehearing (September 12, 1996). The petition for a *writ of certiorari* was filed on December 20, 1996 (No. 96-1041).

THE STATUTORY PROVISION AT ISSUE

Antiterrorism and Effective Death Penalty Act of 1996.

> An application for the writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for *writ of certiorari* which contains a number of factual and legal misstatements.

A.

COURSE OF PROCEEDINGS AND DISPOSITION OF CASE BELOW

The opinion of the Court of Appeals as amended on denial of rehearing fully sets out the course of proceedings and disposition of the case below.

B.

CORRECTION OF MISSTATEMENTS IN PETITION AND PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 15.2, this brief corrects several misstatements and omissions in the petition. These misstatements and omissions aim at undercutting the propriety of the Court of Appeals opinion and to minimize the extent of the constitutional violation and its deleterious effect on Mr. Griffin's trial.

The Petition Omits That The Defendant Never Waived His Right To Be Represented By An Attorney Without A Conflict Of Interest.

Perhaps the petition's most significant omissions relate to trial counsel's failure to alert Mr. Griffin to the conflict of interest brought on by counsel's joint representation of two defendants with divergent interests. Both the Court of Appeals and the district court found that Mr. Griffin, who at trial was represented by the same attorney as his co-defendant, was never told by his retained attorney that joint representation might entail a conflict of interest. Moreover, Mr. Griffin never waived his right to conflict-free counsel. (***Griffin v. McVicar***, 84 F.3d 880, 891) This omission has a direct bearing on the Court of Appeals' holding that Mr. Griffin was denied his right to the effective assistance of counsel.

The Petition Does Not Explain The Court Of Appeals Finding That, Operating Under A Conflict Of Interest, Trial Counsel Was Forced To Deal With The Inconsistencies Among The Witnesses To Minimize Damage To The More Culpable Codefendant To The Detriment Of Mr. Griffin.

The petition downplays evidence which an attorney not laboring under a conflict of interest could have used to exculpate Mr. Griffin. In recounting the trial evidence, the petition states that witnesses named Mr. Griffin, his codefendant, and another man as having been involved in the shooting. The petition omits that the witnesses gave highly inconsistent descriptions of the events surrounding the shooting and in their ascribing of blame. As discussed in the District Court order and Court of Appeals opinion, how trial counsel handled these inconsistencies had a devastating effect on Mr. Griffin's right to effective assistance of counsel:

> [Codefendant] Smith did not have a leg to stand on in presenting a defense. He was unequivocally identified as having shot two of the victims and he had an extensive criminal record which effectively precluded him from testifying. Griffin, on the other hand, had the option of pursuing a defense based on the inconsistences in the testimony identifying him as a shooter.
>
> *Griffin v. McVicar*, 84 F.3d at 889.

The Court of Appeals opinion then listed these inconsistencies, even singling one out as being an implied conflict. *Id.* The opinion then listed specific instances where Mr. Griffin's attorney could have and would have done something different if that attorney had represented only one defendant. *Id.*

While Citing With Approval The District Court's First Ruling, Which Denied Mr. Griffin's Habeas Petition, The Petition Fails To State That The Court of Appeals Found These Conclusions Of Law Untrustworthy Because They Were Based On Inconsistent Findings Of Fact.

The petition quotes at length from the district court's first opinion, which denied Mr. Griffin's application for the *writ of habeas corpus*, but fails to mention that the Court of

Appeals concluded that the district court's factfinding contained inconsistencies which called into question its conclusions of law. The Court of Appeals, in remanding the case, wrote at length about the inconsistencies between the district court's findings and the record, particularly: (1) the district court found inconsistencies regarding whether Marvin Goldenhersh discussed the theory of accountability with Mr. Griffin; and, (2) there were inconsistencies in Goldenhersh's deposition regarding whether he was given facts before trial regarding the potential defense that Griffin was an innocent bystander. The Court of Appeals directed the district court on remand to clarify its factual findings and explain whether its new findings would affect its conclusions of law. ***Griffin v. Camp***, 40 F.3d 170, 174 (7th Cir. 1994). The Court of Appeals noted that the district court adopted the Illinois Supreme Court's version of the facts and accepted trial counsel's testimony regarding his knowledge of potential alternative defenses other than the alibi defense. By emphasizing the conclusions of law without fleshing out why the Court of Appeals found them to be untrustworthy, the petition gives the false impression that the district court's first order, and not the second order, on which the Court of Appeals relied, made correct findings of fact and reached factually-supported conclusions of law. It is the District Court's second order whose factual findings support the Court of Appeals conclusion that Mr. Griffin was denied the effective assistance of counsel.

The Respondent's Status

Since the filing of the petition, the State of Illinois' time to retry Mr. Griffin has elapsed. Mr. Griffin has been free on recognizance bond since October 8, 1996.

REASONS FOR DENYING THE WRIT

I.

CONTRARY TO THE PETITIONER'S CONTENTION, *SUMNER V. MATA* AND *LOUISVILLE & NASHVILLE R. CO. v. MOTTLEY* DO NOT SUPPORT THE PETITIONER'S POSITION THAT THE BENEFITS OF AMENDED 28 U.S.C. § 2254 (D) CANNOT BE WAIVED.

The Court of Appeals correctly evaluated the effect of the State's failure to raise the statute's applicability to this case. The Court of Appeals has stated:

> We do not suggest that § 2254(d) reduces the power of the court in the sense of subject-matter jurisdiction, which survives intact in 28 U.S.C. § 2241; a state may waive the benefits of 28 U.S.C. § 2254(d), although other provisions of the 1996 Act, such as the revised exhaustion requirement in § 2254(b), suggest that counsel's inattention to niceties of federal practice does not forfeit the benefits the law bestows on the state as an entity. *See Also* ***Eaglin v. Welborn***, 57 F.3d 496, 498-99 (7th Cir. 1995) (*en banc)* (holding that a court *may* decide a case on the basis of ***Teague***[1] even if the state's lawyers overlooked that possibility).
>
> ***Lindh v. Murphy***, 96 F.3d 856, 865 (7th Cir. 1996) (*en banc*), *cert granted*, 65
> U.S.L.W. 26 (January 10, 1997 No. 96-6298). (Emphasis added.)

The Court of Appeals has ruled similarly in this case in opting to omit consideration of the amended § 2254(d) because of the State of Illinois' failure to raise or brief the matter before the denial of rehearing in this case. The State argues that *certiorari* must be granted because of what it characterizes as the inconsistency between the Court of Appeals opinion and this Court's decisions in ***Sumner v. Mata***, 449 U.S. 539 (1981) and ***Louisville & Nashville R. Co. v. Mottley***, 211 U.S. 149 (1908). ***Lindh*** and by extension this case do not "ignore" ***Sumner v. Mata*** and ***Mottley***. There is no conflict between the opinion of the Court of Appeals and holdings of this Court – either real or apparent. Neither case relied on by the State changes the fact that the passage of AEDPA, and the Court of Appeals'

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[1]***Teague v. Lane***, 489 U.S. 288 (1989)

refusal to apply it retroactively in this case, did not remove subject matter jurisdiction from the Court of Appeals or from any other federal court.

Sumner v. Mata and ***Mottley*** do not support the petitioner's position. In ***Sumner***, this Court vacated and remanded the cause and found that courts of appeal should henceforth include support from the record or list which enumerated statutory factor removed the presumption of correctness from the state court's factual findings. 449 U.S. at 551. ***Mottley*** held that a party cannot confer jurisdiction on a federal court by anticipating a defense another litigant might assert, but must present a federal question in his own well-pleaded claim to invoke the jurisdiction of the federal courts. 211 U.S. 149, 152. ***Sumner v. Mata*** involved a *habeas corpus* claim where the issue was whether the Court of Appeals properly analyzed a state court finding by applying the presumption of correctness which § 2254(d) mandated. Although the matter was raised in the district court, it was not briefed or argued before the Court of Appeals. This case stands in contrast to ***Sumner***. Until the Court of Appeals denied rehearing, the State never briefed the matter of AEDPA's applicability to this case. Another difference is that this Court in ***Sumner*** noted that the Court of Appeals' opinion did not apply the presumption of correctness or even refer to § 2254(d) in its opinion. 449 U.S. at 547. Yet, the Court of Appeals opinion in this case specifically found the State's inaction as a waiver of the matter and thus chose not to decide the case based on amended § 2254(d). The deference to state court factfinding demanded of the Court of Appeals in ***Sumner*** has not been abrogated by the Court of Appeals in this case. Although not explicitly analyzing the State Court factfinding in this case in light of § 2254(d), the Court of Appeals opinion contains the basis for concluding that the State Court factfinding was unreasonable. *See* This Brief at Reason for Denying the Writ, II, pp. 9-13.

The State's reliance on ***Sumner*** is based on a footnote to the opinion. ***Sumner*** adopted the reasoning of ***Mottley*** that this Court is duty bound to see that the jurisdiction of the court, "which is defined and limited by statute, is not exceeded." 449 U.S. at 457, n.2, citing ***Mottley, 211 U.S. 149, 152***. The footnote explained that because this Court had the benefit of the full briefing and argument from the parties on the § 2254(d) argument, it would decide the § 2254(d) issue. 449 U.S. at 547, n.2. Although the State of Illinois would have this Court give footnote 2 an expansive reading, it must be noted that there are no reported cases found by counsel to support that position. ***Sumner***'s footnote has never been cited as authority. Instead, the Courts of Appeal have taken a tack similar to the Court of Appeals' position in this case.

The Court of Appeals opinion is not alone in finding that a party may waive the benefits of AEDPA. The Seventh Circuit has specifically held this way in ***Lindh v. Murphy***, ***Emerson v. Gramley***, 91 F.3d 898, and ***Watkins v. Meloy***, 95 F.3d 4 (7th Cir. 1996). In addition, the Fourth Circuit held that since a petitioner did not ask the court to apply AEDPA to a pending non-capital case, the court did not apply it. ***Beaver v. Thompson***, 93 F.3d 1186 (4th Cir. 1996), amended --- F.3d --- 1996 WL 69554. Similarly, where neither party argued for the application of AEDPA, and the petition was filed prior to the date the Act took effect, the Court of Appeals did not consider the issue. ***Huynh v. King***, 95 F.3d 1052 (11th Cir. 1996). Similarly, in ***Rehbein v. Clark***, 94 F.3d 478, 481 n.4 (8th Cir. 1996), the Court of Appeals noted that the parties seemed to agree that the AEDPA's provisions should not be applied to Rehbein's appeal.

In a case which is roughly in the same posture as this case, this Court has denied the State of Ohio's *petition for certiorari*. ***Tate v. Glenn***, 71 F.3d 1204 (6th Cir. 1995), *cert. denied*, 58 CrL 1365 (1996). ***Tate v. Glenn*** was a capital death case in which the Court of Appeals held the defendant had received ineffective assistance of counsel. The case was decided

before the effective date of the AEDPA but was still pending in the federal system. In its petition for *certiorari* to this Court, the state argued for the first time that the recently enacted amendments to 28 UCS § 2254 required reversal or remand of the decision vacating the death sentence. This Court denied the petition for *certiorari*. ***Tate v. Glenn*** differs from ***Lindh*** because, unlike ***Tate***, the litigants in ***Lindh*** had briefed the issue for the Court of Appeals sitting *en banc*. In this case, the State never briefed the matter in the Court of Appeals. (*See* ***Ante*** at pp 7-10) The need to grant *certiorari* in this case is no more compelling than it was in ***Tate***.

By contrast to the cases from several Court of Appeals circuits which have either declared that the AEDPA has no retroactive application to non-capital cases, declined to decide pending non-capital cases in light of the AEDPA where the state failed to present the issue on appeal, or found that the matter had retroactive application but was waived and the court decided not to apply the Act on its own, there are no reported cases where a lower court has found the Act confers subject matter jurisdiction and therefore its application cannot be waived. There is no need for this Court to offer instruction to lower courts when the law is well-settled, as it is here.

In this case, the requirements of § 2254(d) as it existed at the time the briefing and argument in the Court of Appeals, was followed to the letter. Moreover, the Court of Appeals decision was preceded by similar rulings on the federal issue by the federal district court and by a majority of a State Appellate Court. ***People v. Griffin***, 124 Ill.App.3d 169, 463 N.E.2d 1063 (5th Dist. 1984). By contrast to ***Sumner***, the Court of Appeals in this case always had jurisdiction to consider this case and acted within its grant of jurisdiction. To apply the ***Sumner*** footnote to this case would create the unforetold result of removing a federal court's jurisdiction to consider this case after two federal courts, having jurisdiction, acted within their grant of jurisdiction. Assuming the validity

of ***Lindh's*** holding that the AEDPA requires retroactive application to non-capital cases pending on appeal in federal court, the Court of Appeals was acting within its authority in choosing not to apply AEDPA's more limited standard of review. The AEDPA did not remove the Court of Appeals' subject matter jurisdiction. This Court's review of this decision in not warranted.

II.

EVEN IF 28 U.S.C. § 2254(d) IS HELD TO BE RETROACTIVE IN NON-CAPITAL CASES, AND THE MATTER CANNOT BE WAIVED BY THE STATE'S FAILURE TO RAISE IT ON APPEAL, THE RESULT OF THE COURT OF APPEAL'S DECISION ON THE MERITS WOULD BE THE SAME.

The State mistakenly argues that despite its never having raised the applicability of the AEDPA, the Court of Appeals *sua sponte* should have "rightfully applied [***Lindh***] in this case." But irrespective of this Court's ruling in ***Lindh v. Murphy***, the AEDPA will not change the result in this case. Mr. Griffin will still prevail under amended § 2254(d)(2) because the State Court decision, ***People v. Griffin***, 109 Ill.2d 293, 487 N.E.2d 599 (1985), is based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding. This unreasonable determination was responsible for the State' Court's erroneous conclusion of law that Mr. Griffin's constitutional right to conflict-free counsel had not been violated.

The State Court's faulty factfinding is skewed by the State Court's insistent focus on whether Mr. Griffin lied when he testified in a post-conviction hearing that he told his trial counsel he was at the scene as an innocent bystander. The State Court opinion analyzed the grand jury proceedings and the testimony of Mr. Griffin and his original trial counsel, Ralph Derango. The State Court found that Mr. Griffin might have told trial counsel something other than he told Mr. Derango. Mr. Derango testified that Mr. Griffin told him he was at the scene and did not participate in the killings. The State Court also concluded

that the grand jury testimony did not affirmatively establish that trial counsel was aware of his client's present-but-innocent claim. The State Court found that Detective Moore's grand jury testimony did not definitively demonstrate whether Mr. Griffin told the police he was an innocent bystander. ***People v. Griffin***, 487 N.E.2d at 603.

At the core of the State Court factfinding is a glaring omission. Consideration of that omission not only would have contradicted the other State Court findings but also supports the Court of Appeals conclusions of law. The fact omitted from the State Court's calculus is that, before trial, Marvin Goldenhersh filed a motion to sever his clients' cases. Trial counsel's reason for seeking a severance demonstrates exactly what counsel knew. Mr. Goldenhersh was "concerned with the potential effects of Griffin's damaging admission on [codefendant] Smith's case." ***Griffin v. McVicar***, 84 F.3d at 887-88, n.6. Although the State Court found Detective Moore's testimony before the grand jury to be too ambiguous to determine if the testimony put Marvin Goldenhersh on notice that Mr. Griffin had told the police he was present but innocent, obviously Mr. Goldenhersh was not confused by the testimony. Goldenhersh knew Mr. Griffin admissions about being at the scene contradicted the alibi defense Goldenhersh expected to mount. Goldenhersh did not want these admissions to adversely affect the fortunes of his other client, Jimmy Smith. Had the State Court considered the implications of the motion to sever, it would not have found Mr. Griffin's statements to the police to be ambiguous and would not have used this finding to justify its conclusion that the credibility issue must be determined against Mr. Griffin. The State Court opinion noted that no conflict manifested itself during trial since counsel presented a joint bystander defense. Therefore, critical to the State Court's conclusions of law, it found nothing in the trial or post-conviction record to disturb what it mistakenly characterized as the post-conviction court's determination that Mr. Griffin's testimony was not credible. 485 N.E.2d at 604.

In stark contrast to the State Court determination, the Court of Appeals opinion correctly concluded that this case does not hinge on a credibility determination as to what Mr. Griffin told Goldenhersh. In fact, for purposes of determining the outcome of this case, the Court of Appeals accepted the State Court's conclusion that Mr. Griffin did not tell Goldenhersh about being present-but-innocent. 84 F.3d at 887-88, n.6. The Court of Appeals summarized the information Mr. Goldenhersh possessed about the present-but- innocent defense and found that, "[g]iven all of this available information, we cannot accept the conclusion that Mr. Goldenhersh was unaware of the difficulties with the alibi defense and the possibility of an innocent bystander defense." 84 F.3d at 887-88.

The Court of Appeals' affirmance of the District Court's decision granting Mr. Griffin's *writ of habeas corpus* is grounded in ***Cuyler v. Sullivan***, 446 U.S. 335 (1980), which predates the State Court proceedings in this case. As the Court of Appeals opinion asserts, ***Cuyler*** established the standard for a finding of ineffective assistance of counsel based on multiple representation. That is, for a petitioner to succeed, there must be an actual conflict of interest which adversely affected his lawyer's performance. ***Griffin v. McVicar***, 84 F.3d at 886-87, citing ***Cuyler***, 446 U.S. at 348. Guided by ***Cuyler***, the Court of Appeals first elaborated on trial counsel's actual conflict:

> [Trial counsel] was possessed of information which would have suggested to an unconflicted counsel the availability of a defense focused on discrediting the identification of Griffin and shifting the blame onto Jimmy Smith.
>
> 84 F.3d at 887.

The Court of Appeals concluded that it is possible that:

> counsel may be ineffective if the joint representation precludes an obvious and viable alternative defense when the common defense is so completely untenable. Failure to consider the possible defenses with a mind to the best interests of a client is particularly likely when the alternative to a

> common defense is helpful to one client but is highly detrimental to the other (as was the case here).
>
> 84 F.3d at 888.

As the Court of Appeals noted, that by contrast to trial counsel:

> An attorney free to consider Griffin's singular interest would, particularly in light of Griffin's waffling on his story, have pointed out the possibility of resting a defense on the weakness and contradictions in the testimony implicating him in the shootings. This approach would have compared favorably with bringing in an alibi which left Griffin with the task of refuting the evidence against Smith as well.
>
> *Id.*

In light of *Cuyler*, the Court of Appeals opinion then enumerated several instances in the record where an unconflicted counsel would have acted in Mr. Griffin's interests as opposed to his codefendant's interests. 84 F.3d at 889-90. The opinion noted that had Goldenhersh only represented Mr. Griffin, at trial he could have "impeached the identifications of Griffin as a shooter by exploiting obvious inconsistencies in testimony." 84 F.3d at 890. Additionally, an unconflicted counsel "would not have had to resort to the suggestion that the victims implicated Griffin in order to frame him because they were responsible for his brother's death a few weeks earlier." *Id.* Furthermore, Goldenhersh gave the jury a highly prejudicial incorrect impression by arguing that Mr. Griffin was accused of shooting Christi Smith and accepted as a premise for his argument that Walker had said that Mr. Griffin had shot him, when the witnesses to the dying declaration disagreed as to whether Walker implicated Mr. Griffin or his codefendant. *Id.*

It was not necessary for the Court of Appeals to defer to the State Court factfinding. That factfinding was incomplete, ignoring the motion to sever and its significance for the rest of the factfinding process. As a consequence, having mistakenly rejected the fact that Goldenhersh knew enough about the possibility of the present-but- innocent defense, the State Court's narrow focus on evaluating counsel's performance at trial caused a total

failure of findings of fact as to whether trial counsel abrogated his duty toward Mr. Griffin and as to whether this dereliction had specific adverse impact on counsel's performance. Thus the difference in the approaches of the State Court and Court of Appeals analyses centers on what trial counsel knew about Mr. Griffin's possible defenses and whether, having particularized knowledge, counsel was obligated to act to make sure Mr. Griffin was protected from proceeding to trial represented by counsel laboring under a conflict. The State Court decision narrowly focused on whether Mr. Griffin's testimony that he told Marvin Goldenhersh he was present was credible and whether Goldenhersh's trial performance was adversely affected by the joint representation. The Court of Appeals first considered what duty Mr. Goldenhersh had ***ab initio*** to protect Mr. Griffin's interests. The Court of Appeals also specified instances in choosing defenses and at trial in which counsel's performance was adversely affected by the conflict of interest. Had the State Court considered all the relevant evidence and framed the issue properly, it would have recognized the conflict of interest and the adverse impact the actual conflict had on Goldenhersh's performance. The Illinois Supreme Court nevertheless reached the unreasonable conclusion that trial counsel had no conflict.

If it is determined that the AEDPA applies to non-capital cases pending in the federal courts and cannot be waived by the State's inaction, that finding should have no negative implications for the outcome of this case. The Court of Appeals correctly interpreted the facts in light of the evidence and reached the correct conclusion of law, in accord with ***Cuyler***, that Mr. Griffin was denied the effective assistance of counsel due to counsel's representation of two clients with divergent interests and that the actual conflict adversely affected his trial. Because the State Court's decision was based on its unreasonable determination of the facts, there is no reason to grant the petition for a *writ of certiorari*.

CONCLUSION

For these reasons, the *petition for writ of certiorari* should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

ARDEN J. LANG
Assistant Defender

OF COUNSEL

NO. 96-1041

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD D. McVICAR, WARDEN, Petitioner

vs.

LEE OTIS GRIFFIN, Respondent

NOTICE AND PROOF OF SERVICE

TO: Honorable William K. Suter
Clerk of the Supreme Court of
the United States
1 First Street N.E.
Washington, D.C. 20543

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(618) 277-6600

Mr. Lee Otis Griffin
308 North Illinois Street
Belleville, IL 62220

Please take notice that I have mailed the original and ten copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis* in the above-captioned case to the Clerk of the U. S. Supreme Court and that I am serving the Attorney General with three copies, and the State's Attorney, SAAP, and Respondent with one copy by depositing the copies in the U.S. Mail, in Springfield, Illinois, with sufficient first class prepaid postage and addressed as indicated above on this 3rd day of February, 1997.

CHARLES M. SCHIEDEL
Deputy Defender

Subscribed and sworn to
before me on this 3rd
day of February, 1997.

NOTARY PUBLIC

OFFICIAL SEAL
EVELYN A. EDWARDS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-6-99

NO. 96-1041

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October Term, 1996

RICHARD D. McVICAR, WARDEN, Petitioner

vs.

LEE OTIS GRIFFIN, Respondent

AFFIDAVIT

I, CHARLES M. SCHIEDEL, state on oath:

1. I am a member of the Bar of the United States Supreme Court.

2. I am counsel of record for respondent, Lee Otis Griffin.

3. At 4:30 p.m., on February 3, 1997 I deposited in the United States mail in Springfield, Illinois, with first class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court, the original and ten copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari in the above-entitled cause.

4. The Respondent's Brief in Opposition to Petition for Writ of Certiorari is due to be filed February 2, 1997.

5. FURTHER AFFIANT SAYETH NOT.

Charles M. Schiedel

CHARLES M. SCHIEDEL
Assistant Defender
COUNSEL FOR RESPONDENT

Subscribed and sworn to
before me on this 3rd day
of February 1997.

Evelyn A Edwards
NOTARY PUBLIC

OFFICIAL SEAL
EVELYN A. EDWARDS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-6-99

OFFICE OF THE STATE APPELLATE DEFENDER
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MICHELE A. KNAPP
ELIZABETH D. CADDICK
KHALIL COX
JOHN M. McCARTHY
DUANE E. SCHUSTER
JANIEEN R. TARRANCE
ASSISTANT DEFENDERS

RECEIVED
FEB 5 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

February 3, 1997

Honorable William K. Suter
Clerk of the Supreme Court
of the United States
1 First Street N.E.
Washington, D.C. 20543

RE: RICHARD D. McVICAR, WARDEN, PETITIONER V. LEE OTIS GRIFFIN, RESPONDENT

Dear Mr. Suter:

I have enclosed the Motion for Leave to Proceed *In Forma Pauperis* and Respondent's Brief in Opposition to Petition for *Writ of Certiorari* in the above-entitled cause. I have also enclosed an Affidavit of mailing.

Sincerely,

Arden J. Lang

ARDEN J. LANG
Assistant Defender

AJL:ee

Enclosures

Printed on Recycled Paper